

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,517

ALVIN O FREEMAN.

Appellant.

v.

UNITED STATES OF AMERICA.

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 4 1963

Nathan J. Paulson
CLERK



(i)

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JOINT APPENDIX

[Filed September 18, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on August 31, 1961, Sworn in on September 5, 1961

THE UNITED STATES OF AMERICA)	Criminal No. 775-61
v.)	Grand Jury No. 1004-61
ALVIN O. FREEMAN)	Violation: 26 U.S.C. 4704(a) 21 U.S.C. 174 (Possession and facilitation of concealment and sale of narcotics)

The Grand Jury charges:

On or about August 28, 1961, within the District of Columbia, Alvin O. Freeman purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, eleven capsules containing a mixture totaling about 440 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

SECOND COUNT:

On or about August 28, 1961, within the District of Columbia, Alvin O. Freeman facilitated the concealment and sale of a narcotic drug, that is, eleven capsules containing a mixture totaling about 440 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Alvin O. Freeman, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about August 28, 1961, within the District of Columbia, Alvin O. Freeman purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package,

a narcotic drug, that is, three capsules containing a mixture totaling about 120 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol.

FOURTH COUNT:

On or about August 28, 1961, within the District of Columbia, Alvin O. Freeman facilitated the concealment and sale of a narcotic drug, that is, three capsules containing a mixture totaling about 120 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Alvin O. Freeman, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the third count of this indictment.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

* * *

* * *

[Filed September 22, 1961]

PLEA OF DEFENDANT

On this 22nd day of September, 1961, the defendant Alvin O. Freeman, appearing in proper person and by his attorney (counsel not present), being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty, thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

CHARLES F. MC LAUGHLIN
Presiding Judge
Criminal Court # Two

* * *

* * *

[Filed Jan. 23, 1963]

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

1

Washington, D.C.
Tuesday, March 27, 1962

Before Judge H.A. SCHWEINHAUT at 11 a.m. today.

* * * * *

4

ON MOTION TO SUPPRESS EVIDENCE
[Out of presence of jury]

* * * * *

7

DAVID PAUL

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q. Detective Paul, your full name is what? A. David Paul.

Q. And you are a member of the Metropolitan Police? A. Yes,
I am.

Q. And assigned to any particular detail or squad? A. Yes, I
am assigned to the Narcotics Squad.

Q. Were you so assigned on August 28 of 1961? A. Yes, sir,
I was.

Q. And on August 28 of 1961 were you working on that day as a
member of the Metropolitan Police Department? A. I was working night
work, from six p.m. to two a.m., on that day, yes, sir.

Q. And who, if anyone, were you working with? A. Detective
Thomas Didone.

* * * * *

8

Q. Did you have any occasion to be in the 1400 block of U Street,
Northwest, in the District of Columbia? A. Yes, sir, we did.

Q. And what was your purpose in being in that immediate
vicinity?

* * * * *

THE WITNESS: We were just routinely cruising, and around
nine-fifteen p.m. we were cruising in the 1400 block of U Street,
Northwest.

BY MR. MC LAUGHLIN:

9 Q. For what purpose? A. Our purposes are to make observations of people who are drug addicts, observe the areas where narcotic activity is most. We cruise the areas of the city where most of the narcotic peddlers frequent. And at 9:15 p.m. we were cruising in the 1400 block of U Street for that particular purpose.

Q. And is that particular section frequented by drug addicts and peddlers? A. Yes, sir. It is probably the most frequented in the city of Washington.

Q. And at about 9:15 p.m. on August 28 did there come a time when you saw the defendant here, Mr. Freeman? A. Yes, sir, there did.

Q. Tell us, if you will, under what circumstances you saw Mr. Freeman on that date. A. I was driving the cruiser and we were going west -- I am sorry; we were driving east -- in the 1400 block of U Street, and I observed the defendant Freeman in company with Clinton Oddie.

Q. Did you know Clinton Oddie prior to that date? A. Yes, sir, I did.

Q. And how did you know Clinton Oddie? A. I know him as a narcotic drug user.

Q. Had you previously arrested him? A. No, sir; but I had previously spoken to him.

10 Q. And on that date of August 28, when you saw Freeman with, --
THE COURT: Wait a minute. You say, in answer to Mr. McLaughlin, you had not previously arrested him. Had he been previously arrested for narcotics violation or as a user?

THE WITNESS: He has been arrested, Your Honor. I don't recall exactly what for; but Clinton Oddie has been previously arrested.

THE COURT: You said categorically that you knew him as a narcotics user prior to this night.

THE WITNESS: Yes, sir.

THE COURT: How did you know that he was a narcotics user?

THE WITNESS: By myself speaking to him, by observing his arm previously to this and observing the needle mark, and he had told me he was a narcotic user, previous to this date, Your Honor.

BY MR. MC LAUGHLIN:

Q. And at that time when you observed him did you know whether or not Mr. Oddie had any gainful employment? A. Mr. Oddie stated he did not.

Q. When you saw Mr. Freeman with Oddie on that date of August 28th, had you previously known Mr. Freeman? A. Yes, I had.

Q. And had you previously arrested Mr. Freeman for violation of the Harrison Narcotic Act? A. Yes, sir, in 1958.

11 Q. And prior to August 28th of 1961 had you seen Freeman in that immediate vicinity or thereabouts? A. Yes, sir, I had seen him previous to that date. As I recall, it was 12th and V Street, Northwest.

Q. And, did you know, was he with anyone at that time? A. Yes, sir, I had seen him previously to this time with a man named John Thomas, whom they called "Peanuts," who was also a narcotic drug user.

Q. And when you saw the defendant Freeman and Oddie on this night of August 28th, what did you do, if anything? A. I stopped the cruiser. We were going to make vagrancy observations and see if they were vagrants at this particular time, on Clinton Oddie and the defendant Freeman here. As I stopped the cruiser, Detective Didone left the cruiser, and I also left the cruiser.

Detective Didone walked over to Clinton Oddie, and the defendant Freeman here left Oddie, who was on the sidewalk, and walked toward the cruiser. As I stepped out of the cruiser, Freeman sort of met me between the cruiser and a parked car, and I had a little conversation with him.

Q. As you saw Freeman approach you as you were getting out of the car, did you observe him do anything? A. Yes, sir, I did.

Q. What did you observe Freeman do? A. I observed him place his right hand alongside his body and move it a little bit to the rear.

12 Q. And then you say you talked to him. What conversation did you have with him after you observed him move his hand in that direction? A. I asked him what he had in his hand. At that time he picked his hand up and opened it, and I observed a cellophane cigarette pack cover in his hand, with a quantity of capsules. I immediately grabbed the capsules.

Q. What did the capsules contain? A. A white powder.

Q. And were they, the capsules, similar to the capsules that are used in the narcotic traffic here in the District of Columbia?

A. Yes, sir, they are.

Q. And when you saw the defendant do that, what happened?

A. I immediately grabbed the package with the capsules and told him he was under arrest. And I asked him if he had any more narcotics on him. And he said yes, and he reached into his righthand pants pocket and he pulled out another cellophane cigarette pack cover, and this one had three capsules of a white powder in it.

Q. Were they similar to the other capsules? A. Yes, sir; they were identical to the other capsules in the package he had in his hand.

13 Q. And what happened to the other defendant, Oddie? A. Clinton Oddie? Clinton Oddie was arrested for vagrancy, under the Uniform Narcotic Act.

MR. MC LAUGHLIN: I believe that is all I have of the witness, Your Honor.

CROSS EXAMINATION

BY MISS POWELL:

Q. Officer, did you advise the defendant of your purpose in --

THE COURT: Did he advise him of what?

BY MISS POWELL:

Q. -- of your purpose in speaking to him?

Were you in uniform, Officer? A. No, ma'am. I was dressed in plain clothes.

Q. Did you advise him of the purpose of your addressing him?

A. You mean when I first walked over? Well, he sort of walked over and we met.

Q. Yes. A. I don't think I specifically stated. I don't recall if I did or not, ma'am, if I specifically said "I am making a vagrancy observation." I don't particularly recall if I made that statement or not, ma'am.

THE COURT: You probably did not. Isn't that so?

THE WITNESS: I don't believe I made the statement, Your Honor, no.

14 THE COURT: Do you normally tell a suspect, if you are in the process of making a vagrancy investigation of him?

THE WITNESS: No, we do not, Your Honor. But occasionally these people will ask us, when talking to them, if this is a vagrancy write-up, or what is the purpose. Occasionally they do ask us that, Your Honor.

THE COURT: I see.

BY MISS POWELL:

Q. And did you advise him what the purpose was when you asked him what he had in his hand? A. I don't quite understand you.

Q. I believe you testified that you noticed he had something in his hand or was doing something with his hand. A. Yes, ma'am.

Q. Did you advise him what your purpose was in asking that? A. I just asked him what was in his hand, ma'am.

Q. And he handed it over perfectly willingly, did he not? A. The thing he had in his hand?

Q. He handed it over when you asked him for it, did he not? A. No, he didn't hand it. He opened his hand, ma'am.

Q. Did you advise him that he was under arrest? A. Yes, ma'am, I certainly did.

15 Q. At what time did you advise him that he was under arrest?

THE COURT: By that question, do you mean at what specific time, or do you mean how long after --

MISS POWELL: At what stage in the --

THE COURT: Yes.

(To the witness:) At what stage in this transaction.

THE WITNESS: At the point when I saw what he had in his hand, and I saw the cellophane with the capsules in it, and I seized the capsules, at that point I told him he was under arrest, ma'am.

BY MISS POWELL:

Q. And did you tell him what he was under arrest for? A. Yes, ma'am; I told him the Harrison Narcotic Act. And then I asked if he had any more narcotics on him, and at that point he reached into his pocket and gave me this other piece of cellophane cigarette pack cover.

MISS POWELL: That is all the questions I have, Your Honor.

THE COURT: It occurs to me, Miss Powell, that this should be the end of the hearing out of the presence of the jury, because whatever comes next -- and I don't know what Officer Didone would testify to, but whatever he testifies -- the fact is that this witness has made a case for a legal arrest, as a matter of law.

16 I suppose that at the end of the whole case a question of fact will be presented for the jury to decide, under the instructions of the Court. If, for example, your man testifies, or somebody else testifies, to the contrary of what Officer Paul has testified to, then an issue of fact is made and probably will arise; and then the Court will instruct the jury, "If you believe this witness, the arrest is valid." And if they believe that isn't the way it occurred, and it was an otherwise innocent situation, then there was no valid arrest and they would have to find him not guilty. Isn't it that simple?

MISS POWELL: Your Honor, I believe under the Kelly case --

THE COURT: Suppose your defendant now takes the stand and testified to the contrary, I would still have to have an issue of fact, wouldn't I?

MISS POWELL: I believe the officer testified, I believe this comes under the Kelly case, in that he was actually in custody before the narcotics were produced.

THE COURT: Not as Officer Paul testifies. Let me ask one more question, however, before I dispose of it.

How long have you been attached to the Narcotics Squad?

THE WITNESS: Since May of 1957, Your Honor.

17 THE COURT: In the course of your assignment to that squad you have made, I suppose, many investigations in narcotics cases?

THE WITNESS: Yes, sir, I have.

THE COURT: Has it been your experience that cellophane envelopes in various sizes, containing white powder, when you find it in the possession of people suspected of narcotics transactions or the use of narcotics, the white powder, when you find this cellophane package containing a white powder, under similar circumstances with people --

MR. MC LAUGHLIN: These contained, the cellophane package with the capsules, Your Honor.

THE COURT: The capsules contain the white powder; that is right.

In that situation does the white powder in the capsules usually turn out to be heroin?

THE WITNESS: Yes, sir, it does, Your Honor.

THE COURT: Now, Miss Powell, my view of the matter is this: On the basis of this testimony, there was clearly no arrest prior to the question, "What have you got in your hand?" According to this witness, the response to that question was the opening of the hand, without the defendant saying anything. And when he opened the hand, the witness sees a cellophane package containing capsules, which obviously contained, he says, a white powder. His experience tells him that that is probably heroin. And then he made the arrest.

18 That is clearly, if that is true, clearly a legal arrest. There was no arrest before he saw the capsules. There was no compulsion of any kind on the defendant, or coerciveness against the defendant of any nature, compelling him to disclose the capsules. So it is just that clear to me.

Now if the jury, with conflicting evidence, if there is any, doesn't believe this evidence, and believes that the situation presented beforehand was seemingly otherwise innocent, then his suspicions wouldn't justify him in making an arrest.

It is that simple to me. I think, therefore, we will have to start the case. And at the conclusion of the testimony I will hear you again on your motion.

* * * * *

[Jury present]

DAVID PAUL

being first duly sworn, was examined and testified as follows:

19 DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q. Officer Paul, your full name is what? A. David Paul.

Q. And you are a member of the Metropolitan Police Department?

A. Yes, sir, I am.

Q. Assigned to any particular squad or detail? A. Assigned to the Narcotics Squad.

Q. And were you a member of the Metropolitan Police Department on August 8 of 1961? A. August 28th.

Q. August 28th, rather. A. Yes, sir, I was.

Q. And were you assigned to the Narcotics Squad? A. Yes, sir, I was.

20 Q. And on August 28 of 1961, what hours were you working on that particular day? A. I was working the six p.m. to two a.m. tour of duty.

Q. And how did you patrol that particular day? A. I was in a Police Department cruiser.

Q. And was there anyone with you? A. Yes, sir.

Q. Who was with you? A. Detective Thomas Didone.

Q. And you say you were patrolling, for what purpose? A. Our basic purpose is to cruise the areas of the city where narcotics addicts and peddlers frequent.

Q. And are you familiar with the 1400 block of U Street, Northwest, in the District of Columbia? A. Yes, sir, I am.

Q. And on August 28th, or on or about that time, would you say that that was a frequent place where violators of the Harrison Narcotics Act --

MISS POWELL: Objection, Your Honor.

THE COURT: Yes, I don't like the form of that question.

MR. MC LAUGHLIN: I will withdraw it, Your Honor.

BY MR. MC LAUGHLIN:

Q. On August 28th were you in the vicinity of the 1400 block of U Street, Northwest, in the District of Columbia? A. Yes, sir, I was.

21 Q. And approximately what time of day or night were you there?

A. About nine-fifteen p.m.

Q. And while in that immediate vicinity did you have an occasion to see the defendant?

THE COURT: Mr. McLaughlin, the objection went, I think, or at least I sustained the objection to your prior question because of its form. I think the witness may be and should be asked whether the 1400 block of U Street at that time, and that vicinity, was an area in which narcotic peddling and purchasing and use were known to the police. That is rather awkward, too; but you know what I mean.

MR. MC LAUGHLIN: Yes. I will ask the general question.

BY MR. MC LAUGHLIN:

Q. On or about that time, Officer, can you tell us whether or not in that immediate vicinity it was frequented by narcotics users and peddlers. A. Yes, sir, 14th and U Street was definitely so, yes, sir.

Q. And on that date of August 28th, while in that immediate vicinity, did you have an occasion to see the defendant, Mr. Freeman?

A. Yes, sir, I did.

22 Q. And when and where did you see him? A. I saw him about 1:15 p.m. on August 28th. He was walking west in the 1400 block of U Street, on the South side of the street, in company with Clinton Oddie.

Q. And when you saw the defendant at that time with Clinton Oddie, did you know the defendant prior to that time? Just yes or no.

A. Yes, sir, I did.

Q. And did you know Oddie prior to that time, yes or no?

A. Yes, sir.

Q. Now when you observed them, what did you do, if anything?

A. I was driving the cruiser. We were driving east on U Street. And I stopped the cruiser. Detective Didone left the cruiser and walked over to Oddie. I left the cruiser and started to walk towards Freeman -- the defendant here -- and the defendant started to walk towards the cruiser.

Q. Now I will ask you this: What was your purpose in stopping the car to question these men? A. To ascertain whether they fell under the Uniform Narcotic Act Vagrancy statute.

Q. And you say as you started to get out of the car, --

THE COURT: Hadn't he better tell us what that is all about, the vagrancy statute?

MR. MC LAUGHLIN: I don't want to get on dangerous ground,

23 Your Honor.

THE COURT: He gives that as his reason. I think the jury better understand what the reason was. And another thing you mentioned in your opening statement which you are not asking him about, and I think you should, is how it was he happened to know what he knew about it.

Well, you had better come to the bench.

MR. MC LAUGHLIN: Yes, I know, Your Honor.

(AT THE BENCH:)

MR. MC LAUGHLIN: I purposely avoided that, Your Honor. I was scared of it.

THE COURT: You mentioned it in your opening statement. I think I know why you are avoiding it. But there may be a vast difference between the purpose of question these two men without any knowledge of their background, and the purpose to question them with knowledge of their background. If you leave out the knowledge of their background, and this motion is made to suppress, doesn't it weaken it at least?

MR. MC LAUGHLIN: It is all right on the motion, but I am afraid of it on the trial, Your Honor. I think just knowing them prior to this time would be broad enough.

THE COURT: That has been the theory of your office all along. I don't agree with it.

MR. MC LAUGHLIN: If Your Honor wants me to do it, I will do it.

24 THE COURT: No; I guess it is safer not to. You try it in your own way. I think it is essential to show a basis, first, for the questioning, the reason why they wanted to question them. And then he has a reason for asking, "What is in your hand? What do you have in your hand?"

What reason would he have, if he saw me on the street, to ask me to open my hand? It may mean the difference between a valid arrest and an invalid one, in my judgment. But it may be it could come later rather than now. You try your case in your own way. You have had plenty of experience with it.

MR. MC LAUGHLIN: Yes.

(Counsel having returned to trial tables:)

THE COURT: The question, Officer, was, and you were about to tell us, what happened when you stopped the automobile. Go ahead and do it.

THE WITNESS: When I stopped, Detective Didone left the automobile and walked over to Clinton Oddie. I also left the automobile; and as I left the automobile, I started towards the back of the automobile. And the defendant Freeman, he was walking; he left the sidewalk and walked towards the cruiser.

BY MR. MC LAUGHLIN:

Q. And what happened as the defendant walked towards you?

25 A. As he walked towards me, as I approached him, I observed his right hand move down to the right-hand side of his body, towards the back. I asked him what he had in his hand; and he took his hand up and opened it, and I observed a cellophane cigarette pack cover, which contained a quantity of capsules of a white powder. I immediately took hold of the package and told the defendant he was under arrest for violation of the Harrison Narcotics Act.

Q. Prior to August 28th of 1961 you had been on the Narcotics Squad for what period of time? A. Since May of 1957.

Q. And during that period of time you have seen several hundreds of capsules similar to the ones you saw on this particular day in his hand? A. Yes, I have seen many capsules similar to that.

Q. And the capsules you saw in the defendant's hand on August 28, were they similar to the capsules used in the narcotics traffic here in the District of Columbia? A. Yes, sir, they are.

Q. And when the defendant, you say you placed the defendant under arrest at that time? A. Yes, sir, I did.

Q. And then did you have any questions of the defendant after you placed him under arrest? A. Yes, sir.

26 Q. What was that? A. I asked him if he had any more narcotics on his person. And he reached into his righthand pants pocket and pulled out another cellophane cigarette pack cover and handed it to me. This one contained three gelatin capsules of a white powder.

* * * * *

29

CROSS EXAMINATION

BY MISS POWELL:

Q. Officer, in your testimony you stated that you were looking for violators of the -- what was it you said? A. I don't understand you. You mean why I was out on the street?

Q. Yes; what was the purpose of your cruising? I believe you said the narcotics vagrancy act, or vagrancy. A. That is one of my purposes, ma'am.

Q. Vagrancy is a misdemeanor, is it not? A. Vagrancy in the Uniform Narcotics Act is a misdemeanor, that is correct, ma'am.

Q. How do you determine when a person is violating the vagrancy act? A. The way I determine it, ma'am, according to the law, if I observe a known narcotic drug addict or convicted narcotic violator in the company of another known drug addict or convicted narcotic violator, we stop and have a conversation with these people. And through the

30 conversation with them I ascertain whether they are using narcotic drugs at the present time, or whether they are gainfully employed, and how they are making their living. And on the basis of these observations they are arrested for vagrancy under the Uniform Narcotic Act.

THE COURT: Unless what?

THE WITNESS: Unless they can satisfactorily explain their purposes and they are not using drugs. But if they are using narcotics and are not working, and they cannot satisfactorily explain their purposes for being out in the streets, in company with other drug addicts, then they are liable for arrest under the Uniform Narcotic Vagrancy Act.

BY MISS POWELL:

Q. Were you in uniform at the time that you made this arrest?

A. No, ma'am. I was in civilian clothes then.

Q. Did you advise the defendant that you were an officer?

A. I told him I was a policeman.

THE COURT: What was your answer?

THE WITNESS: I told him I was a policeman, I believe I used, rather than an "officer."

BY MISS POWELL:

Q. And did you advise him of the purpose of your inquiry of him?

31 A. I didn't have much of a chance to go into the vagrancy conversation with him, ma'am.

Q. Isn't it a fact that when you approached him, seeing him in the company of another narcotics violator, as you testified, that you arrested him at that time for vagrancy? A. No, ma'am. He was never arrested for vagrancy at this time, ma'am.

MISS POWELL: No further questions.

MR. MC LAUGHLIN: I have nothing further of this witness, Your Honor.

THE COURT: Come to the bench, please.

(AT THE BENCH:)

THE COURT: What has he testified to that in your opinion justified him in asking anything of this boy?

MR. MC LAUGHLIN: As I say, I thought that took care of the motion, Your Honor.

THE COURT: No. You misunderstood me. Before the Court, without the jury, you went into the whole story.

MR. MC LAUGHLIN: Yes.

THE COURT: You gave the background and the reasons for what happened. I said at the conclusion of his testimony that I thought I could not hold as a matter of law that this was not a good arrest, because on the basis of what he testified before me it was a good arrest; but supposing at the trial his testimony was contradicted in such a manner as to raise the question whether the circumstances were innocent.

32 If it was an innocent situation, then perhaps he did not have a right to arrest, and an issue of fact for the jury, under proper instructions, would be made.

The way it rests now, he has testified, as I recall it -- before the jury now -- his only testimony is that he knew the man, and that is all. What has he testified to before the jury which made either one of these men suspect, to stop and ask them for anything?

MR. MC LAUGHLIN: I thought Your Honor had already said the arrest was legal.

THE COURT: I don't know that it is, without any background.

MR. MC LAUGHLIN: In view of the fact that Your Honor heard the motion.

THE COURT: On its face. But I told Miss Powell at that time that she could renew her motion after the Government's case was in before the jury. If she renews it, and if your case doesn't improve, I may have to grant it, because I can't take judicial notice of what I heard out of the presence of the jury.

This jury has a right to decide this case now. And if they find the fact to be that there was an innocent situation which didn't justify any inquiry of these people, then the arrest was illegal. That is the point I have been making.

33 MR. MC LAUGHLIN: Then I will go into it, Your Honor.

THE COURT: I think if you don't you run a very strong risk of having me sustain this motion.

(Counsel having returned to trial tables:)

REDIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q. When you saw the defendant Freeman with this Oddie on August 28th of 1961, had you known him prior to that date? A. Yes, I had.

Q. And had you known him as being involved in the --

MISS POWELL: Objection.

BY MR. MC LAUGHLIN:

Q. (continuing) -- narcotics traffic?

THE COURT: I overrule the objection.

THE WITNESS: Yes, sir, I did.

THE COURT: In what respect?

BY MR. MC LAUGHLIN:

Q. And prior to August 28 of 1961 had you arrested the defendant for violation of the Harrison Narcotic Act? A. Yes, sir.

Q. And did you know, on or about the time of August 28th of 1961, that the defendant either was a user or a seller or associated with known addicts or sellers of narcotics in the District of Columbia? A. Yes, sir, I did.

34 THE COURT: That answer won't do. You have given three different hypotheses -- did you know him as a user, as a seller, or as an associate of people who trafficked one way or another in narcotics. Which is it?

THE WITNESS: I would have to say I knew him as an associate and a user, when I saw him on this occasion. I had seen him with other drug addicts in the streets, and I also in conversation with him ascertained that he was a narcotic drug user, prior to this date.

* * * * *

38 THE COURT: Is that your case?

39 MR. MC LAUGHLIN: Yes, Your Honor. The Government will offer in evidence Government Exhibits 1, 2 and 3, and rest.

FURTHER ON DEFENDANT'S MOTION TO SUPPRESS

MISS POWELL: Your Honor, I wish to renew my motion at this time.

* * * * *

THE COURT: Now, Miss Powell.

MISS POWELL: I wish to renew my motion to suppress the evidence, as we have discussed it.

THE COURT: Do you want to be heard on it further?

MISS POWELL: I think I really discussed it.

THE COURT: I understand your position and I think I must overrule the motion.

* * * * *

[Filed March 27, 1962]

VERDICT OF JURY

On this 27th day of March, 1962, came the attorney of the United States; the defendant in proper person and by his attorney Diane K. Powell, Esquire; whereupon the jurors of the regular Petit

Jury panel, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|------------------------|-------------------------|
| 1. June Collins | 7. Charles V. Kirchman |
| 2. Walter E. Ethridge | 8. Lawrence M. Holloway |
| 3. Paul M. Foman | 9. Salome H. Kreft |
| 4. Florence I. Darling | 10. Clarence W. Lee |
| 5. Alverta M. Parker | 11. Edith A. Lee |
| 6. Henry M. Watson | 12. Rowena L. Hamilton |

who are sworn to well and truly try the issue joined herein; the Court directs the calling of one additional person to serve as an alternate juror and Geraldine K. Duffy, being called, is sworn to well and truly try the issue joined herein; whereupon defendant's motion, pro se, to suppress evidence and defendant's supplemental motion, pro se, to suppress evidence are by the Court denied; thereupon defendant's motion by counsel to suppress evidence is by the Court denied; whereupon defendant's oral motion by counsel for judgment of acquittal is by the Court denied; thereupon the alternate juror is discharged and the jury retires to deliberate; whereupon the jury returns into Court and upon their oath say that the defendant is guilty.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court # 5

* * *

* * *

[Filed April 2, 1962]

MOTION FOR JUDGMENT OF ACQUITTAL N.O.V.

Comes now the defendant Alvin O. Freeman by counsel, and respectfully moves that a Judgment of Acquittal n.o.v. be granted, and as grounds therefor states:

1. The Honorable Court erred in denying Defendant's Motion for Judgment of Acquittal made at the close of all the evidence;

2. The Honorable Court erred in denying Defendant's Motion to Suppress certain Evidence taken without a warrant;

3. The Honorable Court erred in denying Defendant's requested Instruction No. 1.

4. The Honorable Court erred in denying Defendant's requested Instruction No. 2

/s/ Diana K. Powell
Attorney for the Defendant
* * *

Points and authorities previously cited are incorporated herein by reference.

/s/ Diana K. Powell
Attorney for Defendant

[Certificate of Service]

44

May 4, 1962

The above-entitled case came on for hearing before the HONORABLE HENRY A. SCHWEINHAUT, UNITED STATES DISTRICT JUDGE, on the defendant's motion for a Judgment of Acquittal N.O.V.

* * * * *

45

MISS POWELL: May it please the Court, a motion for a Judgment of Acquittal N.O.V. has been filed in this case, the case of Alvin O. Freeman, and citing four grounds, which sum up to the admissibility of the evidence consisting of narcotics drugs which were taken from the person of the defendant at the time of his arrest. This was raised prior to trial, and at the trial, and for the record we wish to raise it at this time.

* * * * *

47 THE COURT: Well, now, tell me if I am correct about the evidence in this case: Didn't the narcotics officer -- or maybe there were more than one, I don't remember any more -- there were two of them -- you tried this case, didn't you, Mr. McLaughlin?

MR. MC LAUGHLIN: Yes, Your Honor.

THE COURT: See how close I am to being right about it. Didn't they say -- or at least one of them, whoever testified -- that they had known this boy to be a user and the other one as well? That is my recollection. And that they stopped the car when they saw the two of them to interrogate them rather than to arrest them, to find out whether they had a job; and if they didn't have a job, being known narcotics users, I think the officer said that his intention then would have been to arrest them on a vagrancy charge; but there never was a search; it was an interrogation, and the officer who got out of the car, if only one did -- one of them did certainly -- said that he saw this boy put his hand behind his back and asked him what he had in his hand, and he just

48 showed him -- in his hand he had narcotics. And then he asked him if he had any more on him, and he said -- either said yes or reached in his pocket and pulled out some more. Am I right about that?

MISS POWELL: That is correct, Your Honor.

THE COURT: Or substantially. Which, in my judgment, makes it entirely different. It seems to me that the police ought to have a right to interrogate known narcotics users, find out if they have a job. If they haven't a job, it's a signal of some kind, which may or may not enable the officer, or justify the officer rather, in going further and doing something. In this case, oddly enough, it wasn't disputed so far as I know. They didn't have to go any further than to ask him whether he was working, or what not, or what he had in his hand, and he just handed it over. It wasn't even a search, in my view. Did he testify in this case? I don't think he did.

MR. MC LAUGHLIN: No, Your Honor; he didn't.

MISS POWELL: No, I don't believe he did.

THE COURT: I heard you at length at the trial, and it comes back to me rather clearly. I think it's unusual in the sense that in this case there wasn't any arrest, and there wasn't even a search. The boy apparently just realized that he was caught and handed over the contraband. And so my ruling will be the same.

The motion must be denied.

* * * * *

[Filed May 8, 1962]

JUDGMENT AND COMMITMENT

On this 4th day of May, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Diana K. Powell, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Section 4704(a), Title 26 U.S. Code and Violation of Section 174, Title 21 U.S. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ H. A. Schweinhaut
United States District Judge

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17517

ALVIN O. FREEMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID C. ACHESON,

United States Attorney

FRANK Q. NEBEKER,

WILLIAM H. WILLCOX,

Assistant United States Attorneys

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

FILED JUN 11 1963

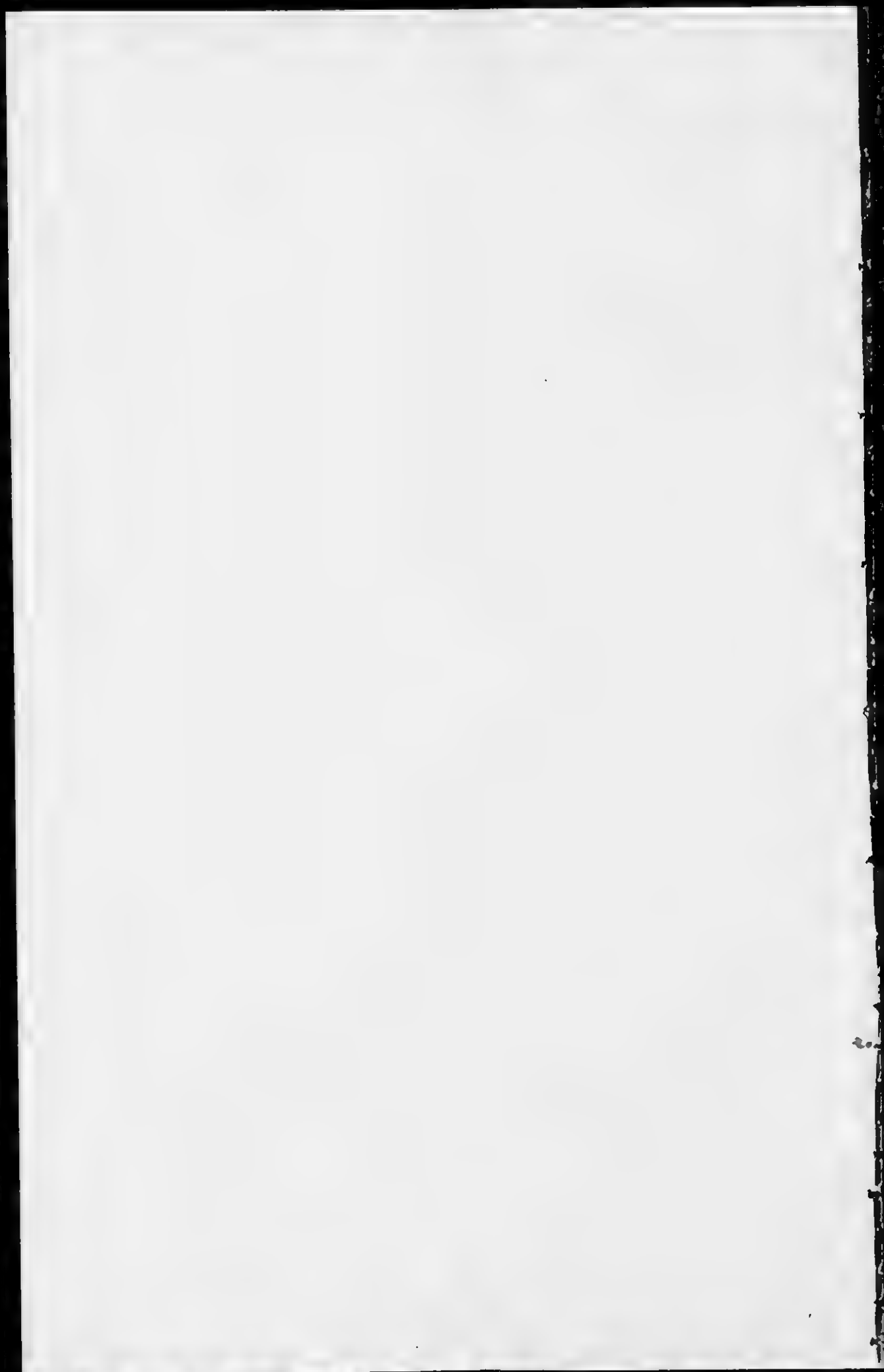
William H. Willcox
CLERK



QUESTION PRESENTED

Did the trial judge correctly deny appellant's motion to suppress as evidence the narcotics that were introduced against him at trial?

(I)



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17517

ALVIN O. FREEMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

***APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA***

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was convicted by a jury of violating the narcotics laws, 21 U.S.C. § 174, 26 U.S.C. § 4704(a) (J.A. 1-2, 19). He was sentenced to imprisonment for 10 years as a second offender (J.A. 22, Information as to previous conviction, filed March 30, 1962). The facts are as follows:

On the night of August 28, 1961, Officers Paul and Didone of the narcotics squad were driving in the area of 14th and U Streets, NW (J.A. 3). Their purpose was to "make observation of people who are drug addicts, observe the area where narcotic activity is most" (J.A. 4). The area of 14th and U Streets is the area of the city which is probably the "most frequented" by addicts (J.A. 4). About 9:15 p.m., Paul and Didone saw appellant "in company with Clinton Oddie" in the 1400 block of U Street (J.A. 4). Paul knew appellant as a user of drugs and an associate of other addicts, and had arrested him in 1958 for violation of the Harrison Narcotics Act. Paul also knew, from prior personal contact with Oddie, that Oddie

was a drug user. On a prior occasion Oddie had told Paul that he had no gainful employment (J.A. 4-5). Upon observing Oddie and appellant, Paul stopped the cruiser. Knowing their backgrounds, Paul and Didone "were going to make vagrancy observations and see if they were [narcotics] vagrants" (J.A. 5, 12, 14-15, Tr. 34). Paul and Didone got out of the cruiser. As Paul left the cruiser appellant left Oddie and came toward Paul (J.A. 5). As he did so Paul "observed [appellant] place his right hand alongside his body and move it a little bit to the rear" (J.A. 6). Paul and appellant met "between the cruiser and a parked car" (J.A. 5). Paul: "I asked him what he had in his hand. At that time he picked his hand up and opened it, and I observed a cellophane cigarette pack cover in his hand, with a quantity of capsules" of white powder (J.A. 6). Paul seized the capsules and placed appellant under arrest (J.A. 6). These capsules, as well as three other capsules which appellant had in his pocket at the time of his arrest, contained narcotics (J.A. 6, Tr. 36-37).

Appellant moved before trial for suppression of the narcotics as evidence. After taking testimony the judge denied the motion (J.A. 9-10). As noted, the jury found appellant guilty (J.A. 19).

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five years or more than twenty years, and in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be

imprisoned not less than ten or more than forty years, and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 U.S.C. § 4704(a) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SUMMARY OF ARGUMENT

The record shows that Officer Paul of the narcotics squad approached appellant, whom he knew as a user of narcotics and who was in the company of another user, to question him about his present involvement with the narcotics traffic. As he did so he saw appellant move his hand furtively. Paul asked appellant what he had in his hand. Appellant responded by opening his hand in which Paul saw capsules containing a white powder. Paul then seized the capsules and placed appellant under arrest. The capsules contained narcotics and were introduced at trial against appellant.

The law is clear that Paul had the right and duty to approach appellant to question him about his involvement with narcotics, and to ask him what he had in his hand. Paul did not compel appellant to show the capsules, and exercised no dominion or control over appellant prior to seizing the capsules displayed by him. Paul's question to appellant did not constitute an arrest or a search, and appellant did not make it such by displaying the capsules.

ARGUMENT

Introduction

At trial a prior arrest of appellant for violation of the Harrison Narcotics Act, the offense charged in the present case, was specifically mentioned in the jury's presence over the objection of appellant, who did not take the stand (J.A. 17). This testimony was introduced under circumstances reported at J.A. 16-17. Its admission into evidence was error. *Fairbanks v. United States*, 96 U.S. App. D.C. 345, 226 F. 2d 251 (1955); *Harper v. United States*, 99 U.S. App. D.C. 324, 239 F. 2d 945 (1956); *Hatchet v. United States*, 54 App. D.C. 43, 293 F. 1010 (1923). The government's case was uncontradicted. But we nevertheless think that the error is such that the case should be remanded for a new trial. Compare *Campbell v. United States*, 85 U.S. App. D.C. 133, 176 F. 2d 45 (1949). Appellant also raises the issue of the admissibility of the narcotics that were introduced against him at trial. The government's position on that issue is presented below.¹

The trial judge correctly denied appellant's motion to suppress as evidence the narcotics that were introduced against him at trial

At the conclusion of the hearing on the motion to suppress the capsules the trial judge said:

On the basis of this testimony, there was clearly no arrest prior to the question, "What have you got in your hand?" According to this witness, the response to that question was the opening of the hand, without the defendant saying anything. And when he opened the hand, the witness sees a cellophane package containing

¹ On April 29, 1963, the government moved the Court to remand this case for a new trial, and included in the motion a discussion of its position on the issue of the admissibility of the narcotics. The Court denied the motion without opinion on May 21, 1963, and ordered that the present brief be filed. While there is the possibility that the denial of the motion was based on a desire of the Court to have presented for its consideration a defense of the admission of the evidence of the prior arrest, we assume that the Court merely wished to have the contested issue formerly briefed and argued before passing on it. Accordingly we do not undertake to defend the admission of the evidence of appellant's prior arrests.

capsules, which obviously contained, he says a white powder. His experience tells him that that is probably heroin. And then he made the arrest. That is clearly, if that is true, clearly a legal arrest. There was no arrest before he saw the capsules. There was no compulsion of any kind on the defendant, or coerciveness against the defendant of any nature, compelling him to disclose the capsules. So it is just that clear to me. (J.A. 9-10)

The judge ruled correctly. Considering the area, much frequented by narcotics users, the fact that appellant and Oddie were together, and Paul's knowledge that appellant and Oddie were narcotics users, that Oddie had had no gainful employment, and that appellant had been previously arrested for a violation of the narcotics laws, the officers had a duty as well as a right to approach them for the purpose of questioning them about their present involvement with narcotics and their means of livelihood. 33 D.C. Code § 416a; 22 D.C. Code § 3302; *Green v. United States*, 104 U.S. App. D.C. 23, 259 F. 2d 180 (1958); *Cogdell v. United States*, 113 U.S. App. D.C. 219, 307 F. 2d 176 (1962); *Nash v. United States*, No. 16,015, D.C. Cir., *aff'd by order*, Feb. 14, 1961. Upon seeing the furtive movement of appellant's hand Paul had a right and duty to ask him what was in his hand. Appellant says, in effect, that Paul was required to close his eyes to a pronounced and significant gesture that he, as a trained and prudent police officer, *Bell v. United States*, 102 U.S. App. D.C. 383, 387, 254 F. 2d 82, 86 (1958), could see merited inquiry, and to close his mind to what he knew about the narcotics background of appellant and his companion. "It would be absurd to suggest that police must arrest a person before they can ask him questions." *Goldsmith v. United States* 107 U.S. App. D.C. 305, 314, 277 F. 2d 335, 344 (1960). A policeman, independent of his power to arrest, may make inquiry of persons coming under his observation. *Mills v. United States*, 90 U.S. App. D.C. 365, 196 F. 2d 601 (1952); *Nash v. United States*, *supra*; *Green v. United States*, *supra*; *Keiningham v. United States*, 113 U.S. App. D.C. 295, 307 F. 2d 632

(1962), and cases cited therein; ² *Jackson v. United States*, 146 A. 2d 577 (D.C. Mun. App. 1958), *petition for allowance of appeal denied*, D.C. Cir., No. 14,921, March 13, 1959; *Larkin v. United States*, 144 A. 2d 100 (D.C. Mun. App. 1958), *reversed on other grounds*, 108 U.S. App. D.C. 239, 281 F. 2d 72 (1960).

By merely asking appellant what was in his hand Paul did not put him under arrest. The question did not constitute a search.³ In *Mills v. United States*, *supra*, an officer asked appellant, a suspected numbers player, "What have you got in the bag?" Appellant made no comment. "He just sort of grinned." The officer said, "Well hand me the bag." Appellant did so. The officer found it contained numbers slips and money. The officer placed appellant under arrest "as soon as I saw those numbers slips." The earliest that the Court found the arrest to have occurred was when the police demanded the bag, *after* the appellant was asked "What have you got in the bag" and after he grinned and refrained from answering the officer's questions. *Keiningham v. United States*, *supra*: "What are you carrying? . . . Do you have any idea what it contains?" *Nash v. United States*, No. 16,015, D.C. Cir., *aff'd by order*, Feb. 14, 1961, joint appendix 5-7: "At that time he had a book in his hand and I asked Nash what was he reading and he said that he was reading a book on Greek or Arabic, and he handed me the book . . . I started thumbing through the book and I came to a rubber band which . . . was used as a marker in this particular book, and there was a brown envelope under the rubber band. At that time Detective Pyle asked Nash what was in the envelope. [Nash] said narcotics . . . After Nash had stated to Officer Pyle and myself that narcotics were in that brown envelope, I then told Nash that he was under arrest." *Jackson v. United States*, *supra*, 146 A. 2d at 578-579: "The officer further stated that at the station house

² *Campbell v. United States*, 110 App. D.C. 109, 289 F. 2d 775 (1961); *Dixon v. United States*, 111 U.S. App. D.C. 305, 296 F. 2d 427 (1961); *Goldsmith v. United States*, *supra*, *Ellis v. United States*, 105 U.S. App. D.C. 86, 264 F. 2d 372; *Green v. United States*, *supra*; *Lee v. United States*, 95 U.S. App. D.C. 156, 221 F. 2d 29 (1954); *Brooks v. United States*, 159 A. 2d 876 (D.C. Mun. App. 1960); *Dickerson v. United States*, 120 A. 2d 588 (D.C. Mun. App. 1956); *Nash v. United States*, *supra*.

³ Appellant twice puts the phrase "to exhibit what was in his hand" in quotes, Br. 7, 10, but the phrase is nowhere in the record.

he asked to see any money appellant had on his person. Appellant produced a one-dollar bill. The serial number on it corresponded to one of the numbers on the list made up by the cigar clerk. Appellant was then placed under arrest."

In the trial judge's words, "There was no compulsion of any kind on the defendant, or coerciveness against the defendant of any nature, compelling him to disclose the capsules." (J.A. 10). Officer Paul exercised no dominion or control over appellant. He simply asked him a question. Nothing required appellant to respond to the question, as he did, by opening his hand, or to respond at all. "He could have declined to talk. He could have refused to halt." *Green v. United States, supra*, 104 U.S. App. D.C. at 23. The response did not make the question unlawful.

The excesses which the Court condemned in *Kelley v. United States*, 111 U.S. App. D.C. 396, 298 F. 2d 310 (1961), cited by appellant, appear nowhere in the present case. In *Kelley*, not only did the defendant not give any indication that he had something to hide, but also the officers clearly restrained his liberty and exercised dominion over him, before the contraband was discovered, when they told him to leave the restaurant where they found him, and brought him outside, "one officer leading the way and the other either alongside or behind" him. There was no such conduct by Officer Paul in the present case. Further, Paul did not, as did the officers in *Kelley* after they asserted control over Kelley by bringing him outside, require appellant "to systematically disclose the contents of his clothing, first one pocket, then another, and then another," or order him to produce the contraband. Paul did not require that appellant disclose or produce anything. The law does not translate Officer Paul's perfectly proper question into an arrest or a search. Thus, the capsules displayed by appellant were correctly admitted into evidence.*

* Even if appellant could be said to have been placed under arrest before he revealed the capsules in his hand, appellant's known narcotics background, his being in company with another known user, and his furtive behavior combined to give the officer probable cause to arrest him for concealment of narcotics. *Bell v. United States, supra*; *Christensen v. United States*, 104 U.S. App. D.C. 35, 259 F. 2d 192 (1958); *Ellis v. United States, supra*; *Simms v. United States*, 171 F. Supp. 834, *aff'd*, 106 U.S. App. D.C. 97, 269 F. 2d 544 (1959).

CONCLUSION

Wherefore, it is respectfully submitted that the Court should affirm the trial court's ruling on the motion to suppress evidence, and remand the case for a new trial.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,

WILLIAM H. WILLCOX,
Assistant United States Attorneys.

